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Supreme Court of the United States

October Term, 1957

No. 475

ANNE E. SCHULTZ, as Administratrix of the Goods, Chattels, Rights and Credits which were of John C. Schultz, and as Administratix Ad Prosequendum of John C. Schultz, deceased,

Petitioner,

vs.

HOME OIL COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

JACOB RASSNER,
Attorney for Petitioner.

THOMAS F. FRAWLEY,
On the Brief.

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Petitioner,

vs.

HOME OIL COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Anne E. Schultz prays that a writ of certiorari issue to review the mandate of the Supreme Court of New Jersey entered in the above entitled action on the 20th day of June, 1957.

Opinion Below

There was no opinion by the Supreme Court of the State of New Jersey. That Court denied the Petition for Certification of Anne E. Schultz, as such administratrix, to the Superior Court, Appellate Division, to review a final judgment of the Superior Court of New Jersey, Appellate Division which affirmed a final judgment of the Superior Court of New Jersey dismissing the plaintiff's cause of action.

The opinion of the Superior Court, Appellate Division of the State of New Jersey, not officially reported as yet, is annexed hereto.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1257 and Rule 19 of the Revised Rules of the Supreme Court of the United States.

Question Presented

Is the dismissal of a case predicated on injuries and eventual death caused by a gasoline fire and explosion an arbitrary intervention and usurpation of the vested right of a trial by jury guaranteed by the New Jersey State Constitution, in contravention of the Due Process of Law Clause of the Fourteenth Amendment of the Constitution of the United States, where a tort feasor is a corporation engaged in interstate commerce in the sale and transportation of gasoline and its storage within the city limits, when evidence of fault is established on uncontradicted evidence and opinion testimony by a fire chief having over 25 years experience?

Reasons for Granting the Writ

1. Fourteenth Amendment of the United States Constitution.

Due process of law has been denied petitioner by the lower Court's arbitrary refusal to grant her the right guaranteed by the Constitution of the State of New Jersey to a trial by jury.

2. The safety of every person in the United States where gasoline is used, is involved, in direct proportion to the legal responsibility for the manner in which gasoline is transported and stored.

Statement

Anne E. Schultz, as Administratrix on behalf of herself as widow and her four children Charles, born September 3, 1945, Caroline, born January 25, 1947, Donna, born January 23, 1948 and Joanne, born June 13, 1953, respectively claimed damages for the wrongful death of her husband John C. Schultz and for conscious pain and suffering from the date of the accident January 23, 1953, to the date of his death April 20, 1953.

The deceased was 32 years of age at the time of his death.

On January 23, 1953, there was a "flash fire" or explosion at a gasoline service station known as "Tubby's" in Paterson, New Jersey, as a result of which the decedent Schultz, an employee of the lessee of the station, was hurled from within the building through the glass front of the service station (P135a) causing terrible burns from which he died about three months later after indescribable suffering.

The station was operated by Joseph De Marco, under a lease agreement with the defendant Home Oil Company, which furnished all the gasoline and motor fuel sold by De Marco, owned all the outside fixtures and a substantial part of the equipment, including a compressor located inside the one story building, and four underground tanks which had been installed in 1940.

At the close of the entire case, the trial court dismissed the complaint (P169a).

From the judgment entered thereon plaintiff appealed to the Appellate Division of the Superior Court of the State of New Jersey which affirmed the judgment of the trial court on the 11th day of March, 1957.

The opinion of the Appellate Division is annexed hereto.

Plaintiff then petitioned the Supreme Court of New Jersey for certification to the Appellate Division to review the judgment of the Appellate Division affirming the Superior Court of New Jersey, which petition was denied, without opinion, on June 20, 1957.

It was urged by plaintiff before the trial court and before the Appellate Division that the case presented questions of fact for the determination of a jury.

It was urged by plaintiff in her brief submitted to the Supreme Court of New Jersey with her petition for certification

1. that a trial court should not remove a case from jury consideration because in its opinion the testimony of a factual and expert witness seems to it to be improbable.

2. that the trial court should give the plaintiff every legitimate inference the circumstances of the case reasonably support where plaintiff was unable to explain the cause of the explosion because of the death of the only person having knowledge of just what occurred.

3. that the trial court should not remove a case from jury consideration when a factual and expert witness testified that in his opinion the flash fire was proximately caused by gasoline fumes escaping from a vent that was so constructed as to be dangerous in use and that the flash fire originated due to this very danger.

4. that the trial court should not base its opinion that testimony is merely speculative and conjectural on the fact that an expert's opinion does not rest upon the direct proof of a fact but rather that the Court should leave for jury consideration the proof of circumstances including the elimination of all other sources and the proof of the alleged source together with proof of circumstances that in his opinion made it a likely cause.

It was urged by plaintiff in her brief for certification that the decision of the trial court was contrary to the general rules of law for jury trials in negligence cases as enunciated by the opinion of this Court in *Schulz* v. *Pennsylvania Railroad Company,* 350 U. S. 523 (brief, p. 15).*

It was further urged by plaintiff in such brief (p. 16, *et seq.*) that the decision of the law court was contrary to the decisions of the United States Supreme Court, particularly *McAllister* v. *United States of America,* 348 U. S. 19.

This argument was advanced under "Point III" of such brief

> "The decision of the court below is in direct conflict with established law" (brief, p. 16).*

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* This brief is part of the Petition for Certification to the Supreme Court of New Jersey which is part of the record herein.

ARGUMENT

POINT I

Plaintiff was denied her inalienable right to have the disputed questions of fact determined by a jury, a right given her by the Constitution of the State of New Jersey.

The Constitution of the State of New Jersey gives the plaintiff the right of trial by jury. Article I, Section 9.

It is elementary that the plaintiff is entitled to a trial by jury as a matter of right.

In *Rogers* v. *Missouri Pacific Railroad Company*, 77 S. Ct. 443, 450:

> "this court is vigilant to exercise its power to review in any case where it appears the litigants have been improperly deprived of that determination."

In *Schulz* v. *Pennsylvania Railroad Company*, 350 U. S. 523, 76 S. Ct. 608, discussing the right to jury trial in cases the court said:

> "The Seventh Amendment to the Constitution provides that 'the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.' We granted certiorari to consider the failure of the District Court to let this case go to the jury."

To the same effect:

Webb v. *Illinois Central Railroad Company*, 77 S. Ct. 451.

Ferguson v. *Moore-McCormack Lines Inc.*, 77 S. Ct. 457.

Gibson v. *Phillips Petroleum Corporation*, 77 S. Ct. 16.

POINT II

Plaintiff has been denied her constitutional rights in that the right of trial by jury guaranteed by the Constitution of the State of New Jersey was refused; in that the trial court arbitrarily invaded and usurped the very function of a jury and assumed to pass upon the weight of the evidence and credibility of the witnesses contrary to the Fourteenth Amendment of the Constitution of the United States.

The Fourteenth Amendment to the United States Constitution provides that no State shall deprive any person of life, liberty, or property, without due process of law.

The United States Supreme Court has been very zealous in its determinations that all litigants shall have due process of law.

In *Powell* v. *Alabama,* 287 U. S. 68-69, 53 S. Ct. at page 64:

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense."

This excerpt from this decision was quoted from at length in *Chandler* v. *Fretag,* 348 U. S. 3, 75 S. Ct. 1, 5.

In *United States* v. *Morgan,* 346 U. S. 502, 74 S. Ct. 247:

> "In behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief."

In *Kern-Limerick Inc.* v. *Scurlock,* 347 U. S. 110, 74 S. Ct. 403, 410:

> "the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest."

Litigants in civil cases are afforded the protection of the due process of law provision of the Fourteenth Amendment.

The Supreme Court recognizes no distinction between civil and criminal cases in affording the protection of the due process of law provision of the Fourteenth Amendment.

In *Powell* v. *Alabama,* 287 U. S. 68-69, 53 S. Ct. at page 64 the Court applied the doctrine of due process of law "in any case, civil or criminal" whether the Court be "state or federal."

In *Covey* v. *Town of Somers,* 351 U. S. 141, 76 S. Ct. 724, the court of Appeals of New York upheld the judicial foreclosure of tax liens on property owned by incompetent without the protection of a guardian to protect the interests of such incompetent. This Court held:

> "we must hold that compliance with the statute would not afford notice to the incompetent and that a taking under such circumstances would be without due process of law."

In *Mullane* v. *Central Hanover Bank & Trust Company,* 339 U. S. 306, 70 S. Ct. 652, 657:

> "when notice is a person's due, process which is a mere gesture is not due process."

In Re Murchison, 349 U. S. 133, 75 S. Ct. 623, 625:

> "A fair trial in a fair tribunal is a basic requirement of due process."

Due process of law under the Fourteenth Amendment has protected defendants in criminal cases.

The Supreme Court has rigidly enforced the provisions of the Fourteenth Amendment that defendants in criminal cases shall not be deprived of their liberty without due process of law.

In *Reece* v. *Georgia*, 350 U. S. 85, 76 S. Ct. 167:

> "The effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the Union may disregard."

In *Pennsylvania* v. *Cloudy*, 350 U. S. 116, 76 S. Ct. 223:

> "The sound premise upon which these holdings rested is that men incarcerated in flagrant violation of their constitutional rights have a remedy."

To the same effect:

Griffin v. *Illinois*, 351 U. S. 12, 76 S. Ct. 585;
Chandler v. *Fretag*, 348 U. S. 3, 75 S. Ct. 1;
Massey v. *Moore*, 348 U. S. 105, 75 S. Ct. 145;
U. S. v. *Morgan*, 346 U. S. 502, 74 S. Ct. 247.

Under these decisions construing the right of the plaintiff to the protection of due process of law in civil cases, this Court must determine whether the plaintiff was afforded a fair trial as required by the Constitution of the State of New Jersey granting the plaintiff a jury trial, and whether the dismissal by the trial court was a denial to the plaintiff of due process of law.

In *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 378:

> "The trial by jury is justly dear to the American people. It has been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

In *Walker* v. *New Mexico & Co. Railroad Company*, 165 U. S. 593:

> "This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."

This Court in recent decisions has upheld the right of the plaintiff to have the issues determined by a jury.

In *Gibson* v. *Phillips Petroleum Company*, 77 S. Ct. 16, the judgment of the Court of Appeals for Fifth Circuit was reversed and judgment ordered for the plaintiff. A reading of the record (232 Fed. 2d, 13) discloses that the plaintiff was injured as a result of an explosion, as in this case. In that case as in this, there were no issues other than those of state (Texas) law.

While the decision of the Fifth Circuit Court of Appeals because of the diversity was a decision comparable to a decision of a state Court of Texas (*Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817), this Court determined that there were issues of fact involved and vacated the judgment of the Court of Appeals and reinstated the judgment of the District Court.

The basis of the decision of the Appellate Division may be summarized.

> "Here, had the proofs been submitted to the jury for determination it would have had to speculate not on probabilities, but on mere possibilities. There was no proof of what agency set in motion the forces that caused the injury to John Schultz, and hence proximate cause would not legitimately have been inferred." (Op. 8a).

The record must be examined to determine the cause of the accident and the probability that the conduct of defendant was a proximate cause of the accident.

It is the fundamental law of this Court that where there may be more than one cause for an accident, the defendant may be held responsible if his conduct became and was one of the causes of the accident.

Porello v. *United States*, 153 Fed. 2d 605, aff. 330 U. S. 440.

Ryan Stevedoring Company v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 76 S. Ct. 232.

It is likewise the fundamental rule of law that it is not the obligation of a plaintiff to prove the precise cause of an accident.

Schulz v. *Pennsylvania Railroad Company,* 350 U. S. 523, 76 S. Ct. 608.

Rogers v. *Missouri Pacific Railroad Company,* 77 S. Ct. 443.

Webb v. *Illinois Central Railroad Company,* 77 S. Ct. 451.

Wilkerson v. *McCarthy,* 336 U. S. 53, 57, 69 S. Ct. 413.

Lavender v. *Kurn,* 327 U. S. 645, 66 S. Ct. 740.

McAllister v. *United States,* 348 U. S. 19, 75 S. Ct. 6.

Tennant v. *Peoria & P. Ry. Co.,* 321 U. S. 29, 64 S. Ct. 409.

In *Schulz* v. *Pennsylvania Railroad Company, supra,* at page 526:

> "But the courts below took this case from the jury because of a possibility that Schulz might have fallen at a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it could not have been compelled to draw such inferences. For 'the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

In *Webb* v. *Illinois Central Railroad Company, supra,* at p. 454, 77 S. Ct.:

> "That there were other possible sources of the clinker would not, of course, justify a directed verdict in the light of our conclusion that the evidence supports with reason a jury finding that the respondent negligently caused the clinker to be in the ballast used in the repair work and failed to use proper care to discover and remove it. Indeed, we do not think that the evidence would reasonably support a finding that the clinker came from another source."

In *McAllister* v. *United States, supra,* at page 22:

> "Of course no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner."

In *Rogers* v. *Missouri Pacific Railroad Company, supra,* at page 449:

> "*The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.*"

The rationale of the decision of the Appellate Division as to this specific issue as to the activating cause of the accident is reflected by its opinion.

> "The plaintiff's theory of the cause of the accident was that fumes from the outside entered the building and were ignited by sparks from the air compressor. *However, no one gave testimony which would support such a theory.*" (Op. p. 4a)

The testimony shows, as the opinion states, that there was an air compressor in the room at the time of the accident; that while Davenport was in the room after the ac-

cident, the compressor went on and he noticed that it arced excessively (P59a-2).

The opinion also recites that the scorching of the underside of the bench above the air compressor "in all probability would have been had sparks from the compressor caused the fire" (Op. 5a).

The opinion demands proof as to what caused the accident for it states that Davenport

> "did not specify what ignited them (the fumes)" (Op. 7a).

The opinion of the Appellate Division refused to accept proof based on circumstantial evidence. It demands direct and positive testimony as to what started the explosion, a doctrine contrary to all of the rules of law and evidence in negligence cases.

The record is to be examined for the proof that satisfies the requirements of this Court to permit the plaintiff to have her rights determined by a jury.

Certain facts must be conceded:

1. an explosion caused the injuries and death of deceased;

2. the explosion started from within the service station;

3. the explosion was caused by gasoline fumes;

4. circumstantial evidence proves that the fumes were ignited by some cause within the service station.

With these basic facts accepted, the main issue of the case is limited to the origin of the explosion, namely, as to whether

1. it came from fumes which necessarily had their origin within the building itself immediately before the accident; or

2. it came from fumes that came into the service station from outside the building and entered the room through means and from causes testified to by witnesses of the plaintiff.

1. The fumes that caused the explosion did not originate within the building.

This statement is proven by the testimony of witnesses with knowledge of the facts.

De Marco, the owner of the station, testified that he left shortly before the accident and

> "that when he left the station, there were no inflammables about, nor any open kerosene or gasoline cans; and that there were tools to be cleaned." (Op. 4a)

Detective Dworak made an inspection of the premises to determine the cause of the explosion; he found nothing that would be suitable to contain any liquid such as gas or anything of an explosive nature (P126a).

It was conceded by defendant that the witness, Detective John Parr would have given the same testimony as the witness Dworak (P132a).

Deputy Fire Chief Davenport testified that there were no volatile liquids in the one or two pans that were in the station at the time he arrived there shortly after the accident (P56a), that the fire was caused by gasoline vapor and that the containers were not involved in the explosion (P56a); that the "flash fire was due to a vapor and not from a fire that had been burning in an open vessel" (P58a).

that the charring over the entire area was up as high as the ceiling and all the way around (P60a).

> "Now, if there was gasoline in a container, the burning would be in this area. It would not cause a charring in that part of the room." (P60a)
>
> "There is nothing in either of these two pictures which would indicate that the fire in this portion of the building was a fire emanating from an open container." (P62a)

There is no discussion in the opinion of the Court as to any conclusion from their statements that the fire could not have originated from any container within the service station.

2. The fumes originated outside the building and came into the room through vents in the windows and cracks in the doors.

This conclusion is based upon the testimony of the Deputy Fire Chief Davenport.

The opinion of the Court has variously characterized his testimony. It states:

> "Because he found no evidence of volatiles inside the building, he testified that any fumes must have emanated from the vent pipes, but he did not specify what ignited them. He did not qualify as an expert in chemistry or physics, nor as a witness on gasoline tank vents; *so his opinion as to defendant's negligence was at best of little weight.*" (P7a)
>
> "Davenport's testimony as to what path the vapor followed after it left the vents, particularly in view of his admission that he had made no tests to determine the amount of vapor escaping, or how it got into the interior of the building was definitely in the realm of conjecture and speculation. He gave no evidential support for the hypothesis that the vapor seeped or flowed into the building through the ventilation holes or under the doors. All these factors,

added to the highly dispersive nature of all vapors, even in still air, much less in a "drafty alleyway", *make Davenport's explanation not only highly fanciful but almost incredible.*" (P8a)

In other words, the courts arbitrarily assumed the function of the jury and passed upon the weight of his evidence and the credibility of the witness.

However the Court, in its opinion, while critical of the end-result of the testimony of the witness, Davenport, did admit:

> That he testified that the fire was immediately extinguished, that it was a "superficial fire", a "flash fire" involving the whole area instantaneously with no deep penetration of the flames; that all the windows of the station had been blown out, but that there were one or two pans which looked as if they could be used for volatile liquids, he found on inspection no indication that they had recently been so used, nor was there any volatile substance within the building (P2a) he stated that in his opinion the fire had been "caused by gasoline vapor in some manner, shape or form" and concluded that since there were no volatile substances within the station, the vapor of fumes had come from the outside, where the only possible source was vent pipes leading from the underground gasoline tanks (P3a).
>
> He also stated that in his opinion the fumes entered the interior of the office portion through cracks in the bottom of the two doors and through a series of ventilation holes in the wooden frame of its front and side windows, which holes were about three or four feet from the floor and each about 3/16 inches in diameter. In support of this theory that the gasoline vapor came from outside the station, Davenport testified that if the fire had been caused by an open container of gasoline, there would have been a charred area in the floor under the container, but that no such charred area was found (P3a).
>
> When asked if it was probable or possible that the fumes came from the vent pipes and entered the

> ventilation holes at the bottom of the window frames and doors, he answered that it was "reasonably probable", and again when asked the same question he said, "Yes, it is possible." (P3a)

The above are admissions of the Court in its opinion.

The record shows that at the time of the trial Davenport (P44a), 48 years old, was deputy of the fire department, that he was first employed in the department in 1932, was promoted to captain in 1942, drill master in 1946, to the battalion in 1944 and battalion chief in 1946. That he had studied for and passed competitive examinations from which the city authorities made appointments to the various ranks; that his studies had included volatiles (P43a), and particularly gasoline fires that he attended about 7500 fires and that about one thousand had involved gasoline fires (P46a) and that it was his duty to determine the cause after the fire is out (P46a).

That he arrived at the fire in question about 90 seconds after the alarm was given, arriving there about 6:54 P. M. (P47a).

The testimony given at considerable length convincingly proves that there was only a flash fire as he stated:

> "It is a matter of judgment, it is a matter of going to a fire and seeing them, and you can determine, through experience, whether a fire has been burning in an open vessel, or a fire has been a flash fire due to a vapor." (P58a)

> "This picture does not show the presence of any such containers which would also support the contention that it was purely a flash fire and was not a fire from gasoline in an open container." (P62a)

Counsel for defendant was intent in attempting to confuse the witness during his entire testimony as the record shows but these positive statements were made.

> "I have determined, sir, that evening that the fumes that were in that building could not have come from anything that was within the building." (P64a)

"I could not come to a positive conclusion where they did come from, a positive factual conclusion. I have an opinion where they came from." (P64a)

"It came from some other part of the building, some other place than the place that was on fire. It did not come from the building itself." (P65a)

"It is reasonably probable, in my opinion, that the fumes come from the vent pipes adjacent to the building on the left side facing it." (P65a)

"The only possible source, in my opinion, of those fumes was from outside the building, the vents.

* * *

The only possible source of these gasoline fumes in the building, in my opinion, are the vent pipes adjacent to the outside of the building." (P66a)

A reading of the rest of the direct examination of the witness establishes he testified that the fumes came through the vents in the windows (P68a, P72a).

The witness said that the fumes came from the vent pipes which had been extended from the tank to diffuse the gases that came therefrom.

"If the vent pipe was so located that it was below the roof and on the side of the building, on the windward side, the fumes would have to accumulate adjacent to the building and from the direction of the wind, the direction of the building, the vents not being properly constructed, the fumes would enter into this show room or this office room. There was no possible source of gasoline vapors inside the building, in my opinion, in my determination, the years of experience as a fireman, those fumes had to come from some place. It came, in my opinion, and I stated it is only an opinion, from the vent pipes." (P67a)

"The vents were too low. They should have been above the roof, period." (P67a)

The trial court properly stated the testimony of the witness:

> "The Court: No. That is different. I allowed that. He has already told us that it didn't properly diffuse the gases because it didn't come above the roof level. I don't know what more he can say." (P76a)

During the cross-examination counsel for defendant attempted to confuse the witness and attempted to draw the distinction that the witness must testify to absolute facts and not an opinion drawn from the facts themselves. The witness explained his testimony:

> "My opinion, sir, is my own, and I got twenty-five years of experience and I am entitled to my opinion from my years of experience as a fireman, but I can't put opinions on paper, and you know I can't." (P83a)

There was considerable discussion during the cross-examination of the witness as to possibilities and probabilities but the witness testified:

> "I will have to state, sir, it was, in my opinion, it was reasonably probable that the gasoline vapors entered the building by that means.
> The Court: All right." (P87a)

There are some 75 pages of testimony given by the witness Davenport. He made the distinction as to conclusions drawn from the actual visible facts and conclusions drawn from his opinions from the facts. He testified many, many times as to probabilities of causes but throughout his testimony he insisted that there was nothing more than a flash fire, a fire that was immediately extinguished and one that was not caused by any volatile substances within the station.

The opinion of the Court picks out sentences that justify the conclusions drawn by the Court which are other

and different than other parts of the testimony of the witnesses. There are statements as to possibilities but "reasonable probability" has been answered to the same inquiry or inquiries.

Under such circumstances the weight of the testimony and the credibility of the witness are questions for a jury not the Court.

The Court in its opinion has placed an unfair burden upon the plaintiff that it must show the precise origin of the accident, the precise cause or causes of the occurrence, must show with mathematical certainty that defendant is to blame for the injuries and death of John Schultz, a burden specifically rejected by this Court in *Schulz* v. *Pennsylvania Railroad Company, supra*,

> *"Fact finding does not require mathematical certainty."*

The exhibits attached to the appendix show the holes in the frame of the window (Exhibit P-4); and that the vents did not come to the top of the roof of the building; likewise that they were capped (Exhibit P-7).

One other corroborating item of proof is the testimony of the nurse Dolores Stowell that the burns were mostly the back from the hips down, mostly (P-11a), evidence that the site of the burns was from about the location of the holes in the windows downward to the floor.

The law as to probabilities and probable cause has been thoroughly discussed in recent opinions of this Court.

As this Court said in *Schulz* v. *Pennsylvania Railroad Company, supra*:

> "In considering the scope of issues entrusted to juries in cases like this, it must be borne in mind

that negligence cannot be proven by direct, precise evidence such as can be used to show a piece of ground is or is not an acre."

In that case this Court thoroughly discussed the different probabilities as to how Schulz came to his death and the inevitable conclusion was reached that the issues must be determined by a jury.

In *McAllister* v. *United States*, 348 U. S. 19, 75 S. Ct. 6, at page 22:

"Of course no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner."

In *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct., page 653:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

In *Webb* v. *Illinois Central Railroad Company*, *supra*, at page 456:

"That there were other possible causes of the clinker would not, of course, justify a directed verdict in light of our conclusion that the evidence supports with reason a jury finding that the defendant caused the clinker to be in the ballast used in the repair work and failed to use proper care to discover and remove it."

In *Rogers* v. *Missouri Pacific Railroad Company*, *supra*, page 447:

"At best uncertainty as to the fact arises from the petitioner's testimony and in that circumstance not the court but the jury was the tribunal to determine the fact."

In *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, at page 62:

> "Courts should not assume that in determining these questions of negligence juries fall short of a fair performance of their constitutional functions."

The *Schulz* and *McAllister* cases, *supra*, cover the law as to probabilities and proximate cause and these decisions strongly confirm the contentions of the plaintiff in this case.

The opinion of the Appellate Division has attempted to piece out scattered facts from which its ultimate result can be justified. Its weakness can readily be ascertained from a consideration of all the testimony, particularly that of Deputy Fire Department Chief Davenport.

Its determination wholly fails to take into consideration:

1. that is is not necessary that the precise exciting cause of the accident must be proven by direct evidence;

2. that circumstantial evidence is proper proof and in many instances it is more satisfactory;

3. that the fumes themselves were not and could not have been actuated by any gasoline within the building;

4. that no explanation has been made to account for the presence of the fumes in the building other than the testimony of Davenport that they came from the vents of the tanks through the holes in the windows or under the doors.

No question has been raised as to the liability of the defendant other than that the proof of plaintiff is not based upon probabilities.

POINT III

Plaintiff has established the special and important reasons required by Rule 19 and the decisions of this Court for the granting of a writ of certiorari in this case.

"Special and important" reasons have been shown to justify the granting of a writ of certiorari in this case because

1. the plaintiff was denied the right of a trial by jury guaranteed by the State Constitution;
2. the courts arbitrarily invaded and usurped the very function of a jury;
3. the courts arbitrarily assumed to pass upon the weight of the evidence and the credibility of the witnesses;
4. the courts have denied the plaintiff due process of law guaranteed by the Fourteenth Amendment.

As this Court said in *Rogers* v. *Missouri Pacific Railroad Company*, supra, at page 451:

> "Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

The primary "special and important" reason is that the safety of every person in the United States where gasoline is used, is involved in direct proportion to the legal responsibility for the manner in which gasoline is transported and stored.

The record of the trial court and the opinion of the Appellate Division disclose that there was arbitrarily imposed upon the plaintiff the impossible burden of proving

the precise direct cause of her husband's death, where admittedly there was no eye witness and where the uncontradicted and uncontradictable evidence supported by the opinion of testimony of a fire chief having over 25 years of experience furnished the proof necessary to have the issues passed upon by a jury as required by the Constitution of the State of New Jersey and as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

As this Court said in *Re Murchison*, 349 U. S. 133, 136, 75 S. Ct. 623, 625:

> "A fair trial in a fair tribunal is a basic requirement of due process."

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

THOMAS F. FRAWLEY,
On the Brief.

APPENDIX A.

Opinon of Appellate Division

Argued, February 18, 1957; decided, March 11, 1957.

Before Judges Goldmann, Freund and Conford.

Mr. Harvey G. Stevenson argued the cause for the plaintiff-appellant (Messrs. Stevenson, Willette & McDermitt, attorneys).

Mr. Philip M. Lustbader argued the cause for the defendant-respondent (Messrs. Schneider, Lustbader & Morgan, attorneys; Mr. George H. Harbaugh, of counsel).

The opinion of the Court was delivered by

Freund, J. A. D.

This is an appeal from a judgment of involuntary dismissal entered upon defendant's motion at the conclusion of the entire case. A similar motion made at the close of the plaintiff's case was denied.

The plaintiff sued to recover damages for her husband's injury and subsequent death from a "flash-fire" or explosion at a gasoline service station known as "Tubby's" in Paterson, New Jersey. The station was operated by Joseph DeMarco, under a lease agreement with the defendant, Home Oil Company, which furnished all the gasoline and motor fuel sold by DeMarco, owned all the outside fixtures and a substantial part of the equipment, including a compressor located inside the one-story building, and four underground gasoline tanks which had been installed in 1940. The service station consisted of a service area and an enclosed office portion with two windows, one in front and one on the side, and three doors, two opening on the outside, one at the front and one in the rear, and a side door for access to the service area.

Appendix A—Opinion of Appellate Division

Joseph L. Davenport, for 25 years a member of the Paterson Fire Department and at the time of trial the deputy chief thereof, testified on behalf of the plaintiff that on the evening of January 23, 1953, he responded to a fire alarm which took him to Tubby's Service Station; that he was "in charge of that fire," and that his duties included an investigation to determine the cause of the fire. When he arrived at the scene he saw the plaintiff's decedent, John C. Schultz, lying directly outside the front door of the office of the service station building; that, although severely burned, Schultz was still conscious; that he ordered him wrapped in blankets and taken to the nearest hospital. He also testified that the fire, which was immediately extinguished, was a "superficial fire," a "flash fire," and involved the whole area instantaneously, but that there was no deep penetration of the flames.

He testified further that all the windows of the station had been blown out, but that, although there were "one or two pans" which looked as though they could be used for volatile liquids, he found upon inspection no indication that they had recently been so used, nor was there any volatile substance inside the building. He stated that in his opinion the fire had been "caused by gasoline vapor in some manner, shape or form" and concluded that since there were no volatile substances inside the station, the vapor or fumes had come from the outside, where the only possible source was vent pipes leading from the underground gasoline tanks. He stated that the purpose of such vent pipes is to permit the escape of gasoline vapor which is generated by the agitation of the fuel in the tanks when being either filled or emptied.

The testimony and photographic exhibits disclose that there were two sets of vent pipes: one set of two vents was located in the rear of the building and there is some indication that they were not in use; the other consisting of three vent pipes was located against the outside wall of the

building, and the pipes extended 11½ feet above the ground, to within three or four inches below the roof of the one-story building. When asked whether the fumes came from the vent pipes on the side or rear of the building, Deputy Chief Davenport said he did not know. However, he further testified that the vents should have extended above the roof, although he gave it as his opinion that the vents provided adequate means for the diffusion of any gas fumes which might come from the underground tanks. He also stated that in his opinion the fumes entered the interior of the office portion of the station building through cracks in the bottom of its two doors and through a series of ventilation holes in the wooden frames of its front and side windows, which holes were about three or four feet from the floor and each about 3/16 inches in diameter. In support of his theory that the gasoline vapor came from outside the station, Davenport testified that if the fire had been caused by an open container of gasoline, there would have been a charred area in the floor underneath the container, but that no such charred area was found. However, he admitted that in his written report of the fire he had stated: "Cause unknown," because, according to his testimony, "factually there is nothing here to substantiate what I gave as my opinion." He testified that the fumes that were in the building could not have come from anything that was inside the building that evening, but "it is possible." When asked if it was probable or possible that the fumes came from the vent pipes and entered the ventilation holes at the bottom of the window frames and doors, he answered that it was "reasonably probable," and again when asked the same question, he said, "Yes, it is possible." Previously, when asked the same question, he said: "I did not say that the fumes came through. I said it was possible for those to come through and also possible for the fumes to come through the opening of the frame door at the rear of the building. Those are possibilities, sir." While he admitted

that the Fire Department had an explosion meter and that he had watched it demonstrated, he said that he himself had made no tests on the premise, nor had he checked the vents to determine if fumes were escaping.

Joseph De Marco, the operator of the station, testified that occasionally both he and Schultz smoked inside the service station building; that on the day of the accident, decedent's first day of work, he himself had left for home about 6:15 P. M.; that when he left the station, there were no inflammables about, nor any open kerosene or gasoline cans; and that there were no tools to be cleaned. He further testified that he never saw sparks emitted by the compressor.

The plaintiff's theory of the cause of the accident was that fumes from the outside entered the building and were ignited by sparks from the air compressor. However, no one gave testimony which would support such a theory.

The defendant called two witnesses. The first, Soso Cokinos, who operates a refuse business, testified that he stored his three trucks on Tubby's premises and customarily stopped in at the station in the evening to review the day's work and plan the next day's work. Further, that on the evening of the accident he went to the station at about 6:30 P. M.; that Schultz was cleaning tools in a five-gallon can, half full of gasoline, and that the place was "pretty stuffy and hot and the furnace was going". However, Davenport testified the stove was "out"—this, in spite of the cold winter weather. Cokinos further testified that the gasoline fumes became nauseating as the tools were dropped into and pulled out of the can, and that after about half an hour he left and went next door to a tavern to "finish his receipts for that evening". Shortly thereafter someone came into the tavern and told him of the explosion.

Dr. Clarence Winchell, a chemist called by the defendant, testified as an expert witness that he examined the

premises on seven different occasions in December, 1955 and January, 1956; that he made a series of tests with a meter and otherwise for gas fumes coming from the vent pipes, but found none; that any gasoline vapor leaving the pipes would disperse so quickly that after travelling 15 to 20 inches it would be incombustible. Since the three vent pipes in question extended 11.6 feet in height, he concluded that the fire and resulting explosion "could not possibly" have been caused by fumes emanating from the vent pipes. However, he testified that the underside of a bench above the air compressor, while slightly scorched, was not blistered, which in all probability it would have been had sparks from the compressor caused the fire.

From the judgment of involuntary dismissal at the close of all the evidence, the plaintiff appeals, arguing that the trial court erred in taking from the jury the issues of responsibility, dangerous condition, negligence and nuisance under the foresight for harm doctrine, and in excluding evidence as to the custom of the trade with respect to construction and maintenance of vapor vents.

The plaintiff's cause of action is predicated upon the alleged negligence of the defendant in failing to observe its duty of care toward the plaintiff. Negligence is never presumed and the burden of proof is upon the plaintiff. *Callahan* v. *National Lead Co.*, 4 N. J. 150 (1950); *Shellhammer* v. *Lehigh Valley R.R Co.*, 14 N. J. 341 (1954), cert. denied 347 U. S. 990, 98 L. Ed. 1124, 74 S. Ct. 852 (1954), rehearing denied 348 U. S. 852, 99 L. Ed. 672, 75 S. Ct. 20 (1954). The question of whether the defendant was negligent or violated a duty it owed to the decedent or whether its action could, under the facts and circumstances here presented, be viewed as such by a reasonable man, cannot be considered in the abstract. If there is no proof that such negligence was the cause of decedent's injuries, the contention must fall. *McCombe* v. *Public Service Railway Co.*, 95 N. J. L. 187 (E. & A., 1920); *Mc-*

Cappin v. *Park Capitol Corp.*, 42 N. J. Super. 169 (App. Div. 1956). For the plaintiff to recover damages, the evidence must be sufficient to sustain the hypothesis that defendant's negligence resulted in plaintiff's injury.

Here, on defendant's motion for involuntary dismissal at the close of all the evidence, the trial court entered a judgment dismissing the complaint. The motion for dismissal was made pursuant to *R.R.* 4:42-2(b) which provides that the defendant may move for a dismissal of the action on the ground that upon the facts and the law the plaintiff has shown no right to relief. On such a motion the court must take as true all evidence which supports the claim of the plaintiff and give him the benefit of all legitimate and logical inferences to be drawn therefrom, *McKinney* v. *Public Service Interstate Transp. Co.*, 4 N. J. 229, 243 (1950); *Mellon* v. *Penna.-Reading Seashore Lines*, 7 N. J. 415, 419 (1951), including those inferences which arise from the proofs offered on defendant's behalf, *Van Cott* v. *North Jersey St. Ry. Co.*, 72 N. J. L. 229 (E. & A. 1905); *Hawthorne* v. *Jowett*, 121 N. J. L. 38 (E. & A. 1938) However, to recover for injuries sustained because of the negligent act of another, especially where the evidence is circumstantial, the proofs must show not merely a possibility, "but a probability that the injury resulted from defendant's negligence", *Woschenko* v. *C. Schmidt & Sons*, 2 N. J. 269, 277 (1949); *Flexmir, Inc.* v. *Lindeman & Co.*, 4 N. J. 509, 514 (1950); *McCappin* v. *Park Capitol Corp.*, *supra*.

We have carefully examined the evidence here presented in the light of the above stated principles of law. We note that the flash fire or explosion occurred on a cold evening in January, 1953; that gasoline is not very volatile under such weather conditions; that the vapor vents would expel vapor fumes from the underground storage tanks when being filled or emptied, but that neither operation was taking place at the time of the accident. The theory

of the plaintiff's cause of action is that gasoline vapor which left the vents at a height of 11½ feet above the ground descended to about three or four feet above the ground and entered the station office through ventilation holes 3/16 of an inch in diameter, or through cracks in the door—in a concentration sufficient to be explosive. Joseph DeMarco, the operator of the station, testified that at the side of the building where the vent pipes were, there is a "drafty alleyway". Clearly, the draft would not be in the direction of the ventilation holes in the windows, but in a transverse direction, and would operate to disperse more quickly any gasoline fumes which might have leaked from the vent pipes. Moreover, it should be noted that the gasoline fumes would after emanating from the side vent pipes not only have had to permeate a "drafty alleyway", but would have had to turn a corner in order to seep through the front or rear door.

The plaintiff's only witness as to causation and negligence was Deputy Chief Davenport, who testified that the vents were too low; that, according to all the leading authorities on this particular type of installation, they should have been above the roof; but when asked specifically whether the vents permitted sufficient diffusion, he said, "In my opinion, they did, sir." Because he found no evidence of volatiles inside the building, he testified that any fumes must have emanated from the vent pipes, but he did not specify what ignited them. He did not qualify as an expert in chemistry or physics, nor as an expert on gasoline tank vents; so his opinion as to defendant's negligence was at best of little weight. *Rempfer* v. *Deerfield Packing Corp.*, 4 N. J. 135, 145 (1950). In *Bowman* v. *Central R. Co. of N. J.*, 27 N. J. Super. 370, 373 (App. Div. 1953), it was stated that "Negligence or a circumstantial basis generating a logical or legitimate inference of its existence must be established by competent proof."

Davenport's testimony as to what path the vapor followed after it left the vents, particularly in view of his admission that he had made no tests to determine the amount of vapor escaping, or how it got into the interior of the building, was definitely in the realm of conjecture and speculation. He gave no evidential support for the hypothesis that the vapor seeped or flowed into the building through the ventilation holes or under the doors. All these factors, added to the highly dispersive nature of all vapors, even in still air, much less in a "drafty alleyway," make Davenport's explanation not only highly fanciful, but almost incredible. Indeed, as stated, he himself admitted that "factually there is nothing here to substantiate what I gave as my opinion."

In *Ferdinand* v. *Agricultural Ins. Co. of Watertown, N. Y.*, 22 N. J. 482, 493 (1956), it was stated that "when the proof of a particular fact is so meager or so fraught with doubt that a reasonably intelligent mind could come to no conclusion but that the fact did not exist there is no question for the jury to decide. Likewise, when the proof on a question of fact is so strong as to admit of no reasonable doubt as to its existence, again, there is no question for the jury to decide. In both these cases the court must make the determination and advise the jury accordingly."

Here, had the proofs been submitted to the jury for determination it would have had to speculate not on probabilities, but on mere possibilities. There was no proof whatever of what agency set in motion the forces that caused the injury to John Schultz, and hence proximate cause could not legitimately have been inferred. *McCombe* v. *Public Service Railway Co., supra.* Surmise and conjecture cannot be substituted for competent probative evidence. *Matchett* v. *F. C. Reinhardt Holding Co.*, 110 N. J. L. 601 (E. & A., 1933); *Shellhammer* v. *Lehigh Valley R.R. Co., supra*, at p. 344.

Although the plaintiff contends on this appeal that the court erred in excluding evidence as to trade custom in the construction and installation of vent pipes in service stations, in view of the fact that the record is devoid of any evidence that the construction of the vent pipes, even if substandard, caused decedent's injury, the contention would not warrant reversal. *Ball* v. *Atlantic City Ambassador Hotel Corp.*, 137 N. J. L. 744 (E. & A., 1948).

Affirmed.

APPENDIX B

Mandate on Affirmance

This cause having been duly argued before this Court by Harvey G. Stevenson, counsel for the appellant and Philip M. Lustbader, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Law Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court and that the record be remitted to the Superior Court, Law Division to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Divsion, at Trenton on the 11th day of March, 1957.

I. GRANT SCOTT,
Clerk of the Superior Court.

I hereby certify that the foregoing is a true copy of the original on file in my office.

I. GRANT SCOTT,
Clerk.

APPENDIX C

Order Denying Petition

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Harry Heher, Senior Associate Justice, at Trenton on the 30th day of June, 1957.

JOHN H. GILDES,
Clerk of the Superior Court.

Filed:

Jun 30 1957

JOHN H. GILDEA,

JOHN H. GILDEA,
Clerk.

A TRUE COPY.

JOHN H. GILDEA,
Clerk.